Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Truth in Billing and	)	CC Docket No. 98-170
Billing Format	)	
	)	
Nationwide Association of State	)	CG Docket No. 04-208
Utility Consumer Advocates Petition	)	
For Declaratory Ruling Regarding	)	
Truth in Billing	)	

COMMENTS

United States Cellular Corporation ("USCC"), a wireless carrier serving approximately 5.1 million customers in numerous markets nationwide, hereby files its Comments on the "Notice of Proposed Rulemaking" component of the FCC's recent "Truth in Billing" order.[1] USCC opposes the additional regulatory measures proposed in the Further Notice, considering them unnecessary, wasteful of time and resources, and antithetical to the First Amendment to the U. S. Constitution. However, USCC wishes to support the rules and policies adopted in the Truth in Billing Order, especially the Commission's pre-emption of state regulation requiring or prohibiting the use of line items in wireless bills. Those newly adopted rules, in conjunction with industry efforts at self-regulation, constitute a sufficient safeguard for wireless consumer interests. USCC also supports the additional state pre-emption proposals contained in the Further Notice.

I. The FCC's Decisions in the Truth in Billing Order Were Fair and Reasonable.

USCC did not believe that any FCC action was required in response to the Petition For Declaratory Ruling filed by the National Association of State Regulatory Consumer Advocates

[1] See In the Matter of Truth in Billing and Billing Format; National Association of State Utility Consumer Advocates Petition for Declaratory Ruling Regarding Truth in Billing, Second Report and Order, Declaratory

("NASUCA"). However, a careful review of the Truth in Billing Order has persuaded us that the FCC's actions were a reasonable response to NASUCA's concerns. NASUCA had proposed that wireless and interexchange carriers be "prohibited from imposing line items unless those charges [were] expressly mandated by federal state or local regulatory action."[2] Since the FCC does not require wireless carriers to recover any of the specific costs which federal mandates impose, including those for universal service, adoption of the NASUCA proposal would have meant that wireless carriers' bills could have contained no references whatever to federal mandates or regulations, except for federal, state and local taxes. Wireless carriers, including USCC, urged rejection of this proposal.

They argued that NASUCA's proposed rules were unnecessary in a competitive industry, would deprive customers of useful information about the costs of particular government programs, such as universal service, would be very difficult to administer and would require undesirable micromanagement of carrier bills. Carriers also maintained the NASUCA proposal would inhibit their ability to enter into long term contracts by requiring changes in "basic" rates to accommodate regulatory costs, which changes would breach such contracts. The carriers also noted that the NASUCA proposal was inconsistent with the CTIA "Consumer Code" and other desirable efforts at industry self regulation and would violate the First Amendment's protections of "commercial speech." Carriers also noted increasing state regulation of the language used in their bills in contravention of Section 332(c)(3)(A) of the Communications Act, which prohibits state regulation of wireless "rates," and asked that the FCC pre-empt such unlawful actions by the states.

Ruling, and Second Further Notice of Proposed Rulemaking, CC Docket No. 98-170; CG Docket No. 04-208, FCC 05-55, released March 18, 2005 ("Truth in Billing Order and/or Further Notice").

[2] NASUCA Petition For Declaratory Ruling, p. vii.

Obviously taking those wireless concerns into account, the FCC has opted for far more modest and defensible regulatory actions in response to the NASUCA proposal. The Commission has decided to apply Section 64.2401(h) of the FCC's Rules to CMRS carriers, making clear that their billing descriptions must be "brief, clear, non-misleading and in plain language," and reiterating that "discretionary" line items should not be misrepresented as taxes or charges required to be imposed on customers. The FCC also "clarified" that any line item on a bill purporting to recover the costs of a specific government program must not exceed the actual costs of that program.[3] However, the FCC reaffirmed carriers' rights to include "discretionary" line items on their bills and more importantly, ruled, in accordance with carriers' arguments that

> "state regulations requiring or prohibiting the use of line items for CMRS constitute rate regulation and are pre-empted under Section 332(c)(3)(A)."

Thus, the FCC's approach was eminently reasonable. Wireless carriers remain free to communicate with their customers on bills as they see fit, as is appropriate in a free society. However, such communications must be clear and not misleading and carriers must not either exaggerate their costs of complying with a specific regulatory program or represent such a program as a "tax" or as requiring a payment by the customer unless that is the case. Further, the FCC has wisely decided to enforce Section 332(c)(3)(A), thus averting the needless and counterproductive costs of forcing carriers to comply with the conflicting billing mandates of 50 states and the District of Columbia.

However, as will be discussed below, some of the "tentative conclusions" in the Further Notice attached to the Truth in Billing Order reflect a regrettable unwillingness to leave well enough alone. The FCC should not adopt those tentative conclusions, while the Commission, if

[3] Truth in Billing Order, ¶ 1.

it does adopt new rules, should certainly assert pre-emptive authority over any inconsistent state regulations of wireless billing practices.

II. There Is No Need For Additional Micromanagement of Wireless Bills.

Much of the Further Notice is devoted to consideration of two basic issues, which it summarizes as follows:

> "we tentatively conclude that where carriers choose to list charges in a separate line item on their customer bills, government mandated charges must be placed in a section of the bill separate from all other charges. We also solicit comment on how we should enforce the difference between mandated and non-mandated charges for truth in billing purposes."[4]

The Further Notice analyzes at length whether only charges that a carrier is required to collect from customers, such as taxes, can be considered "mandated" or whether government authorized but discretionary reimbursements by customers for charges previously imposed on carriers also fit into the "mandatory" category.[5] Comment is also sought on whether there is a need for separation on bills of "mandated" from "non-mandated" charges or whether there should be additional separations of sub-categories within those categories of charges.[6] Also, the Further Notice asks whether there should be standard "labeling" of all such charges on bills "subject to imperative national uniformity."[7] The Commission is also concerned with how carriers now label their general "regulatory" items on bills. Should property tax expenses, for example, be properly labeled a "regulatory assessment?"[8] Is it unfair and misleading to lump federal regulatory costs into a single line item and, if so, what should be done about it?[9]

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[4] Further Notice, ¶39.
[5] Further Notice, ¶¶40-43.
[6] Ibid, ¶44.
[7] Ibid.
[8] Ibid, ¶47.
[9] Ibid, ¶48.

We respectfully request that the FCC not pursue these inquiries and not adopt new rules. To do so would be to involve itself in the supervision of the billing formats of multiple carriers and in deciding issues of bill wording of no public interest significance whatever.[10] Rather, it should leave matters where they are. To prescribe mandatory customer billing descriptions and "labels" is clearly antithetical to the spirit of the First Amendment and the ideal of competition, as uniformity in billing descriptions will tend to promote uniformity in service offerings.

Moreover, we believe that such micromanagement of wireless bill wording would be ruled unconstitutional by the courts. Under the relevant test, restrictions on commercial speech must be shown to "directly advance" a "substantial" government interest and must not be "more extensive than necessary to serve that interest."[11] The Supreme Court has also stated that in order to prove that a law restricting commercial speech will in fact "directly advance" a governmental interest, the government must "demonstrate [that] the harms it recites are real and that [the] restriction [on speech] will in fact alleviate them to a material degree," and that demonstration cannot be based on "mere speculation and conjecture."[12] The law must also be "narrowly tailored" to achieve its goals and must be the result of a "careful calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition."[13]

The proposed new rules meet none of those requirements. The government's interest has not been shown to be "substantial" and the "harms" which would be cured by the proposed new regulations are in fact entirely "speculative" in nature. A demonstration of "harm" to consumers

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[10] If the FCC chooses to adopt such regulations, however, we would urge that the "mandated" category should include all customer charges for programs for which carriers must make specific payments and may seek reimbursement from customers, such as USF, even if customer payments to carriers for such mandatory programs should be listed separately from "taxes." However, both taxes and reimbursements for specific regulatory programs are properly placed in a different category than "general regulatory" line items, which should be permitted also, but listed separately on bills.

[11] Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 566 (1980).

[12] Edenfield v. Fane, 507 U.S. 761, 770-71 (1993).

[13] Florida Bar v. Went For It, Inc., 515 U.S. 618 632 (1995); Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993).

would have to rest on proof that carriers could not recover all of their regulatory costs through general charges that they now recover through "misleading" regulatory line items. It would also have to demonstrate that correcting that those minor price discrepancies represented a "substantial" governmental interest, and that the "benefits" of the regulation exceeded its costs of implementation. The Further Notice contains no such showing and indeed, such a showing cannot be made.

However, even if the new requirements would not be considered unconstitutional, they are certainly unnecessary. USCC, like most wireless carriers, adheres to the CTIA Consumer Code. Its bills separate "Taxes," including the Federal Telephone Excise Tax and comparable local taxes, from "Other Charges and Credits," under which is included the "Federal USF Charge." As such charges change, the changes are reflected on monthly customer bills. USCC believes that its billing practices are neither unfair nor misleading, and not in need of further federal regulation.

However, apart from USCC's practices, for the FCC to take this action would not be in the public interest, as the wireless industry has proven vigorously competitive without federal regulation of wireless bill formats. As the FCC has concluded in its two most recent wireless competition reports, there is "effective competition in the CMRS marketplace.[14] The Eighth Competition Report, issued in 2003, noted increases in: (a) wireless minutes of use; (b) the number of wireless subscribers; and (c) average revenue per subscriber, while also recording "downward price trends, the continued expansion of mobile networks into new and existing markets, high rates of investment and churn rates of 30 percent.[15] The Ninth Competition Report, issued in 2004, also affirmed the presence of "effective competition in the CMRS

[14] In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, 18 FCC Rcd 14783 (2003) ("Eight Competition Report").

marketplace," as well as large increases in wireless minutes of use and numbers of subscribers."[16] Trends reported in the Ninth Competition Report included a growth in mobile data usage, and while pricing information was "mixed," the FCC noted that U.S. voice calls remained "far less expensive on a per minute basis" than in Western Europe and that the U.S. remained a "competitive" pricing marketplace.[17] "Churn" rates remained high, with one cited study from September 2003 showing that 26% of wireless subscribers had switched carriers during the past year, a trend which will only accelerate when the affect of number portability can be fully measured for 2004. "Churning" customers cited "cost and network quality" as the main reasons for changing service providers.[18] The wireless industry is thus a textbook example of the power of competition to enhance consumer welfare and serve the public interest. Given this recent performance, the industry does not deserve more heavy handed bureaucratic intervention concerning how it communicates with its customers.

The Further Notice's exaggerated concern with the wording of wireless bills also reflects a fundamental misunderstanding of and condescension toward wireless consumers. As noted above, wireless customers choose (and often change) their carriers based on considerations of price, signal coverage and service quality, not on how carriers describe their services on bills. The Further Notice reflects an evident belief that carriers can fraudulently induce their customers to stick with them by disguising unjustified price increases as "regulatory" line items. However, customers are perfectly capable of making judgments based on the overall charges they pay wireless carriers and would not alter that judgment in "solidarity" with a carrier's high cost of regulation. If a carrier charges less money than a competitor for the same quality and type of

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[15] Eighth Competition Report, ¶¶ 57, 59.
[16] In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Ninth Report, 19 FCC Rcd 20592 (2004) ("Ninth Competition Report").
[17] Ninth Competition Report, ¶¶ 5, 113.
[18] Ninth Competition Report, ¶ 161.

service, the lower price carrier will gain customers even if the higher price carrier places its inflated costs in a "regulatory mandate" line item. The FCC's competition reports provide no basis for concluding that American consumers cannot and do not make those judgments every day without bureaucratic assistance.

III. The FCC Should Not Adopt "Point of Sale" Restrictions.

The Further Notice also "tentatively concludes" that carriers must disclose their "full rate," including any "non-mandated" line items (however defined) and must provide a "reasonable estimate of government mandated surcharges" to the consumer at the "point of sale" prior to the signing of any contract with the customer.

USCC would urge the FCC not to adopt any such requirements, which would be a fertile source of litigation and useless controversy, owing to their inherent ambiguities. They would also undermine a carrier's ability to seek reimbursement for government imposed costs. For example, if "non-mandated" charges were defined to include universal service fund payments by customers to carriers, then such a provision would place all carriers collecting such payments in violation of the rules, since such USF charges vary monthly by the total charges on a customer's bill and quarterly by the "contribution factor," that is, the percentage applied against the customer's charges to determine the USF charge. Hence, the "full rate" would be impossible to know in advance or disclose to a prospective customer. And even if USF reimbursements were defined as "mandatory," as they should be, what would a "reasonable estimate" of such future charges be, at a time when, for example, the USF "contribution factor" has increased from 8.7% (Second Quarter 2004) to 11.1% (Second Quarter 2005)?[19] No carrier has a crystal ball sufficiently precise to predict those kinds of percentage changes in USF funding requirements.

[19] See Public Notice, "Proposed Second Quarter 2004 Universal Service Contribution Factor," DA 04-1621, released March 5, 2004; Public Notice, "Proposed Second Quarter 2005 Universal Service Contribution Factor," DA 05-648, released March 10, 2005.

Section 54.712 of the FCC's Rules now requires that carriers must recover from customers no more than their actual payments to the Universal Service Administrative Company ("USAC"). But in complying with that reasonable requirement carriers are crucially aided by knowing what the USAC contribution factor will actually be for a given quarter, something they cannot know and should not be held responsible for knowing a year in advance. As a general principle, carriers should not be required to predict what federal, state and local governments will do to influence their costs in the future. They can and should be held responsible for not exaggerating those cost impacts once they are aware of them. The FCC proposal approaches this issue from the wrong end of the telescope and is thus not reasonable. It should not be adopted.

IV. The FCC Should Certainly Pre-Empt All State Regulation of Carrier Billing Practices.

USCC strongly believes that there is no need for additional FCC regulation of wireless billing practices. However, whether or not the FCC chooses to adopt any new regulations, it should adopt the Further Notice's proposal that the FCC pre-empt state regulation of wireless billing practices. To have 50 states adopting different and contradictory requirements with respect to the content of wireless bills would impose intolerable burdens on wireless carriers, to no good end. USCC agrees with the FCC's tentative conclusion that the states should not be able to regulate either carrier billing practices or the content of the wireless bills, except to the extent they are applying generally applicable contractual and consumer protection laws.[20]

Whatever regulations should be applied to the content of wireless bills should be uniform, clear and comprehensible to all stakeholders. Such regulations should help and not hinder the growth of the national wireless network, which will be vital to the future prosperity and national security of the United States.

[20] Further Notice, ¶ 53.

CONCLUSION

For the foregoing reasons, USCC asks that the FCC not adopt the tentative conclusions proposed in the Further Notice. However, we also ask that it pre-empt any state regulation of wireless billing practices to the fullest extent it can under the relevant laws.

Respectfully submitted,

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June 24, 2005

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